Supreme Court, U.S.
FILED

97 . 2 8 8 AUG 1 3 1997

No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1996

VICKY LEWIS and GARY LEWIS, individually, as parents, as next friends and as administrator of the estate of KATHRYN C. LEWIS,

Petitioners,

v.

BRUNSWICK CORP.,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

DAVID E. HUDSON
(*Counsel of Record*)
WILLIAM J. KEOGH, III
HULL, TOWILL, NORMAN & BARRETT, P.C.
Suite 700 – SunTrust Bank Building
801 Broad Street
Augusta, Georgia 30901
(706) 722-4481

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

65 pp

QUESTIONS PRESENTED

1. The Federal Boat Safety Act of 1971, 46 U.S.C. § 4301-4311 ("Boat Safety Act") has both an express pre-emption clause and an express "savings clause" in respect to state authority. In light of recent Supreme Court holdings on pre-emption, is it constitutionally permissible to *imply* the federal pre-emption of state common law claims into the Boat Safety Act when that act *expressly* provides a reliable indicium of congressional intent with respect to state authority, and when no federal agency has issued an applicable pre-emptive "regulation" as *expressly required* by the Act?

2. The Boat Safety Act provides that "(c)ompliance with (the Act) does not relieve a person from liability at common law or under state law." 46 U.S.C. § 4311(g). Was it error to hold that torts of *omission* are impliedly pre-empted under the Boat Safety Act while torts of *commission* are simultaneously expressly saved from pre-emption, when such a differentiation between types of torts is not made in the Boat Safety Act's pre-emption or "savings" clauses?

PARTIES TO PROCEEDINGS

To the best of Petitioners' knowledge, the caption contains all of the parties to this action.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

OPINIONS IN THE CASE 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 3

1. Implied Pre-emption Analysis is Inapposite Under *Cipollone* and its Progeny 3

2. The Lack of Any Enacted Federal Propeller Guard Regulation Precludes Pre-emption under *Freightliner* 6

3. The Savings Clause Can Be Given Full Effect Under *Lohr* Without Implying Pre-emption ... 10

CONCLUSION 13

APPENDIX A1

TABLE OF AUTHORITIES

Page

CASES:

BFP v. Resolution Trust Corp., 511 U.S. ___, 128 L.Ed.2d 556 (1994) 5

California Fed. Sav. and Loan Ass'n v. Guerra, 479 U.S. 272 (1987) 10

Chicago v. Environmental Defense Fund, 511 U.S. 328, 128 L.Ed.2d 302 (1994) 5

Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992) 3, 4, 6

CSX Transp., Inc. v. Easterwood, 507 U.S. ___, 123 L.Ed.2d 387 (1993) 3

FLRA v. U.S. Dept. of Navy, 966 F.2d 747 (3rd Cir. 1992) 7

Freightliner Corp. v. Myrick, 514 U.S. 280 (1995) 3, 8, 9, 10, 13

In Re Ford Motor Co. Bronco II, 1995 WL 683854 (E.D. La. Nov. 13, 1995) 12

In Re Haas, 48 F.3d 1153 (11th Cir. 1995) 5

Keene Corp. v. United States, 508 U.S. 200, 124 L.Ed.2d 118 (1993) 5

Lewis v. Brunswick Corp., 107 F.3d 1494 (11th Cir. 1997) 1, 3

Lewis v. Brunswick Corp., 922 F.Supp. 613 (S.D. Ga. 1996) 1

Lohr v. Medtronic, Inc., ___ U.S. ___, 135 L.Ed.2d 700 (1996) 3, 10, 13

Silkwood v. Kerr-McGee Corp., 464 U.S. 238 (1984) 6

TABLE OF AUTHORITIES – Continued

Page

STATUTES RULES AND REGULATIONS:

44 Fed. Reg. 46849 (1979) 8

46 C.F.R. § 160 *et seq.* (1995) 7

Administrative Procedures Act, 5 U.S.C. §§ 551-559 ..... 1, 7

Copyright Act of 1976, 17 U.S.C. § 301(a) (1977) 5

Domestic Housing and International Recovery and Financial Stability Act, 12 U.S.C. § 1715z-12, -18(e) (1989) 5

Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1144(a), (c)(1) (1985) 5

Federal Boat Safety Act of 1971, 46 U.S.C. §§ 4301-4311 ..... *passim*

Motor Vehicle Safety Act, 15 U.S.C. § 1381 *et seq.* 8

OPINIONS IN THE CASE

1. *Lewis v. Brunswick Corp.*, 922 F.Supp. 613 (S.D. Ga. 1996). Civil Action No. CV 195-096. Jurisdiction: 28 U.S.C. § 1332 (diversity of citizenship and amount in controversy).

2. *Lewis v. Brunswick Corp.*, 107 F.3d 1494 (11th Cir. 1997). Appeal No. 96-8130. Jurisdiction: 28 U.S.C. § 1291 (review of final judgment of district courts).

3. *Lewis v. Brunswick Corp.*, Order denying Petition for Rehearing and Suggestion of Rehearing En Banc. Appeal No. 96-8130. Entered May 15, 1997.

JURISDICTION

This Court has jurisdiction to review the decisions of the Eleventh Circuit Court of Appeals pursuant to 28 U.S.C. § 1254(1). The district court granted summary judgment against Petitioners on all counts on January 22, 1996. The Eleventh Circuit upheld the district court on March 21, 1997. The Eleventh Circuit denied rehearing on May 15, 1997, and this Petition was timely filed pursuant to Supreme Court Rule 13 within 90 days thereof.

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions and regulations are lengthy and are reprinted verbatim in the appendix pursuant to Supreme Court Rule 14.1(f). These provisions are 46 U.S.C. §§ 4302, 4306, 4311, and 5 U.S.C. § 553.

STATEMENT OF THE CASE

This case arises from the granting of Respondent Brunswick Corp.'s motion for summary judgment in the district court below. This motion was submitted upon stipulated facts prior to the initiation of discovery, to allow an efficient and "clean" determination of the threshold pre-emption issue which is the subject of this petition.

This civil action involves the death of Petitioners' 19 year old daughter. The Lewis' daughter was a passenger on a boat on Strom Thurmond Lake in Georgia. The boat was powered by a 75 horsepower outboard motor manufactured by Brunswick, which had exposed propeller blades and was operating without a protective guard, shroud or nozzle. During a turning maneuver, Petitioners' daughter was ejected from the boat and dragged into or struck by the rapidly rotating propeller blades of the outboard motor manufactured by Brunswick. She was pronounced dead at the scene, leaving no child or spouse. The coroner concluded that her death was caused by "chop wounds to (the) head and upper body."

Petitioners contend that Brunswick's failure to place a protective device on the propeller violates several Georgia common law duties, and filed an action based upon these state law claims in a Georgia state court. Brunswick removed this case to the United States District Court for the Southern District of Georgia due to the diversity of citizenship of the parties and the requisite amount in controversy. 28 U.S.C. § 1332(a)(1). Brunswick thereafter moved for summary judgment on the stipulated facts referenced above, asserting that the common law claims

brought by the Lewis Family are pre-empted by the Boat Safety Act. The district court granted Brunswick's motion for summary judgment on all counts, and Petitioners appealed to the Eleventh Circuit Court of Appeals. 28 U.S.C. §§ 1291, 1294(1).

REASONS FOR GRANTING THE WRIT

The Eleventh Circuit correctly held that Plaintiffs' claims were not expressly pre-empted by the Boat Safety Act. *Lewis*, 107 F.3d at 1501. It went on to hold, however, that Plaintiffs' claims were impliedly pre-empted. As shown below, this finding of implied pre-emption is in conflict with prior analogous decisions of this Court, most notably *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992); *Freightliner Corp. v. Myrick*, 514 U.S. 280 (1995); and *Lohr v. Medtronic, Inc.*, ___ U.S. ___, 135 L.Ed.2d 700 (1996). Petitioners therefore petition this Court for a Writ of Certiorari to resolve this conflict of important federal law.

1. Implied Pre-emption Analysis is Inapposite Under *Cipollone* and its Progeny.

This Court, through *Cipollone* and its progeny, has established a common sense framework to determine the pre-emptive scope of a federal act. "If the statute contains an express pre-emption clause, the task of statutory construction must in the first instance focus on the plain wording of the clause, which necessarily contains *the best evidence of Congress' pre-emptive intent.*" *CSX Transp., Inc. v. Easterwood*, 507 U.S. ___, ___, 123 L.Ed.2d 387, 396

(1993) (emphasis added). While the presence of an express pre-emption clause does not entirely foreclose the possibility of implied pre-emption, the pre-emptive scope of an act may still be "governed by [its] express language" if it provides a "reliable indicium of Congressional intent with respect to state authority." *See Cipollone*, 505 U.S. at ___, 120 L.Ed.2d at 423. The Court must "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the *clear and manifest purpose* of Congress." *Cipollone*, 505 U.S. at ___, 120 L.Ed.2d at 422 (emphasis added).

The Pre-emption Clause of the Boat Safety Act provides in pertinent part that

> a State or political subdivision of a State may not establish, continue in effect, or enforce a law or regulation establishing a recreational vessel or associated equipment performance or other safety standard or imposing a requirement for associated equipment . . . that is not identical to a regulation prescribed under Section 4302 of this title.

46 U.S.C. § 4306. The Boat Safety Act "Savings Clause" further provides that

> *(c)ompliance* with this chapter or standards, regulations, or orders prescribed under this chapter *does not relieve a person from liability at common law or under State law.*

46 U.S.C. § 4311(g) (emphasis added).

Congress has aptly shown its ability to expressly refer to "common law" when it intends to include it within the scope of a pre-emption clause, although it did

not do so in the Pre-emption Clause of the Boat Safety Act. *Compare, e.g.*, Copyright Act of 1976, 17 U.S.C. § 301(a) (1977) (pre-empting rights "under the common law or statutes of any State"); Domestic Housing and International Recovery and Financial Stability Act, 12 U.S.C. § 1715z-12, -18(e) (1989) (pre-empting any "State constitution, statute, court decree, common law, rule, or public policy"); *see also* Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1144(a), (c)(1) (1985) (pre-empting all state "laws, decisions, rules, regulations, or other State action having the effect of law"). "Where Congress knows how to say something but chooses not to, its silence is controlling." *In Re Haas*, 48 F.3d 1153, 1156 (11th Cir. 1995) (citing *BFP v. Resolution Trust Corp.*, 511 U.S. ___, 128 L.Ed.2d 556 (1994)).

More importantly, Congress showed in the Savings Clause of the Boat Safety Act *itself* that it expressly considered "common law" in this piece of legislation. Instead of including it in the Pre-emption Clause, though, Congress expressly preserved common law from pre-emption by including it in the Savings Clause. "It is generally presumed that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another." *Chicago v. Environmental Defense Fund*, 511 U.S. 328, ___, 128 L.Ed.2d 302, 311 (1994) (internal quotation marks omitted); *see also Keene Corp. v. United States*, 508 U.S. 200, ___, 124 L.Ed.2d 118, 128 (1993) (same).

Congress' decision to forego listing "common law" in the Boat Safety Act's Pre-emption Clause, coupled with its express *inclusion* in the Savings Clause, is the best evidence (let alone a "reliable indicium") of Congress'

intent in regard to common law. That intent, as set forth in the express terms of the Boat Safety Act and supported by the presumptions detailed above, is to save common law liability from pre-emption. *See also, e.g. Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251 (1984) (the lack of federal remedies in an act makes it "difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct").

Thus, while the Eleventh Circuit was correct in holding that there was no express pre-emption of common law claims, it erred in then implying pre-emption given the lack of "clear and manifest purpose" to do so. Rather, the Boat Safety Act expressly provides "a reliable indicium of Congressional intent with respect to state authority". It is therefore improper under *Cipollone* to further imply pre-emption when Congress has clearly and expressly stated that which it intended to pre-empt.

2. The Lack of Any Enacted Federal Propeller Guard Regulation Precludes Pre-emption under *Freightliner.*

The Boat Safety Act pre-empts laws, regulations and requirements which conflict with any "regulation prescribed under section 4302 of (the Boat Safety Act)." 46 U.S.C. § 4306. The Coast Guard submitted the issue of propeller guards to a subcommittee, which recommended in 1989 that "(t)he U.S. Coast Guard should take no regulatory action to require propeller guards" at that time. The Coast Guard then internally adopted this recommendation to take no regulatory action. This mere

internal adoption of a recommendation cannot have any pre-emptive effect as it does not meet the express requirements of either § 4302 of the Boat Safety Act, or the requirements of the Administrative Procedures Act, 5 U.S.C. §§ 551-559.

The Administrative Procedures Act applies to all "substantive rules" having "substantive legal effect." *See FLRA v. U.S. Dept. of Navy*, 966 F.2d 747, 762 n. 14 (3rd Cir. 1992). The Coast Guard never began (much less finished) a formal rulemaking process with respect to propeller guards under the Administrative Procedures Act, however, as there was no notice of proposed rulemaking published in the Federal Register as required by 5 U.S.C. § 553(b), and no publication of any substantive rule banning propeller guards as required by 5 U.S.C. § 553(d). *Compare* 46 C.F.R. § 160 *et seq.* (1995) (regulations under the Boat Safety Act which have been properly published in the Federal Register as required). Moreover both § 4302(b) of the Boat Safety Act itself, and § 553(d) of the Administrative Procedures Act, require that regulations promulgated thereunder must be published, and must establish a future effective date. The record does not show that these requirements were ever met, either. Thus this adopted recommendation to not undertake regulatory action was not a "regulation" under the Administrative Procedures Act, nor was it "prescribed under Section 4302" of the Boat Safety Act. The mere internal adoption of a recommendation therefore fails to meet the express requirements of the Pre-emption Clause. 46 U.S.C. § 4306.

Congress gave an express dictate (let alone a "reliable indicium" of its intent) with respect to state authority, i.e., that state law would only be pre-empted by "regulations"

which were "prescribed under section 4302". It is therefore improper to imply that the pre-emptive scope expands beyond that which Congress unequivocally stated. Simply put, claims relating to propeller guards cannot be pre-empted by federal law *where there is no federal regulation on the subject as required by the express terms of the Pre-emption Clause.*

A similar implied pre-emption scenario was rejected by this Court in *Freightliner*. In the analogous case of anti-lock brakes, the agency empowered to make regulations under the Motor Vehicle Safety Act, 15 U.S.C. § 1381 *et seq.*, had passed standards in regard to braking ("Standard 121") but these standards were suspended by a federal court. *See Freightliner*, 514 U.S. at ___, 131 L.Ed.2d at 391. Thus, the manufacturer's case was even stronger in *Freightliner* because, although not in force, the rulemaking agency had promulgated and maintained specific standards "so that manufacturers would know 'what the agency still considers to be reasonable standards for minimum acceptable performance.' " *Id.* (quoting 44 Fed. Reg. 46849 (1979)). Nonetheless, the suspension of the regulation was sufficient for this Court to hold that plaintiffs' state law claims were not expressly or impliedly pre-empted.

> Petitioners' pre-emption argument is ultimately futile, however, because respondents' common-law actions do not conflict with federal law. . . . [I]t is not impossible for petitioners to comply with both federal and state law because *there is simply no federal standard for a private party to comply with.* Nothing in the Safety Act or its regulations currently regulates the use of ABS devices. As Standard 121 *imposes no requirements either requiring or prohibiting* ABS systems, tractor-trailer manufacturers are free to obey state standards concerning stopping distances and vehicle stability.

Freightliner, 514 U.S. at ___, 131 L.Ed.2d at 393-394 (emphasis added).

The case at bar is nearly identical to *Freightliner* because the Coast Guard has never promulgated affirmative regulations under section 4302 "either requiring or prohibiting (propeller guards)" and "has not ordered (engine) manufacturers to refrain from using (propeller guards)." There is therefore no clear regulation under section 4302 in regard to propeller guards, and thus nothing in force to pre-empt Petitioners' claims. *There is no federal requirement which a common law claim would undermine or abrogate in regard to propeller guards,* and it is therefore improper to imply pre-emption on the basis that it would interfere with Congressional intent.

> [W]e cannot say that the respondents' lawsuits frustrate "the accomplishment and execution of the full purposes and objectives of Congress." (cits). In the absence of a promulgated safety standard, *the Act simply fails to address the need for ABS devices at all.* Further, Standard 121 currently has nothing to say concerning ABS devices one way or the other, and NHTSA has not ordered truck manufacturers to refrain from using ABS devices. *A finding of liability against petitioners would undermine no federal objectives or purposes with respect to ABS devices, since none exist.*

Freightliner, 514 U.S. at ___, 131 L.Ed.2d at 394 (emphasis added). Since there has been no "promulgated safety

standard" in regard to propeller guards, and manufacturers have not been "ordered . . . to refrain from using" propeller guards, there is nothing which a common law verdict could do to undermine Congressional purpose *where no purpose exists*. The *Freightliner* rationale should therefore be dispositive in denying Brunswick's pre-emption argument, as should the clear and express pre-emption language contained in the Boat Safety Act.

3. The Savings Clause Can Be Given Full Effect Under *Lohr* Without Implying Pre-emption.

The Eleventh Circuit in effect held that the lack of any affirmative regulation on propeller guards gives manufacturers the option as a matter of implied federal regulation to either include guards or not. There is no express provision in the Boat Safety Act which suggests that this option was a goal of Congress when it enacted the Boat Safety Act. Rather, the Boat Safety Act expressly provides that "(c)ompliance (with the Boat Safety Act) does not relieve a person from liability at common law. . . . " 46 U.S.C. § 4311(g). Thus the Savings Clause provides that even if such an unregulated option exists, *its exercise is potentially subject to common law liability*. The Savings Clause can thus be given full effect without frustrating congressional purposes, since neither the Boat Safety Act nor the Coast Guard require Brunswick to do anything whatsoever in regard to propeller guards. *See Lohr*, ___ U.S. at ___, 135 L.Ed.2d at 725-726 (common law survives if the result of common law "merely provides another reason for manufacturers to comply with identical existing 'requirements' under federal law"); *California*

Fed. Sav. and Loan Ass'n v. Guerra, 479 U.S. 272, 281 (1987) (implied pre-emption occurs when it is physically impossible to comply with both federal and state law).

The Eleventh Circuit interpreted the Savings Clause to mean that a manufacturer can only be held liable if it were to actually install a defective guard. Petitioners respectfully ask: why would any manufacturer ever install a propeller guard if that was the only way in which it could be held liable, *even if such a guard made its product safer*? There is no textual support to differentiate torts of commission (providing a propeller guard) from torts of omission (failure to provide a guard), since the manufacturer "complies" with the Boat Safety Act in either case; this "compliance (with the Boat Safety Act) does not relieve (the manufacturer) from liability at common law . . . ". 46 U.S.C. § 4311(g). As stated in reference to the analogous Motor Vehicle Safety Act:

> (g)overnment regulations provide uniform performance requirements to deter manufacturers from marketing defectively designed products. Design defect litigation, because it is fact intensive, insulated from the political process, and capable of responding to rapid technological advances, provides more individualized remedies for harm caused by defective designs. Thus, whereas the NHTSA may have found it impossible, from a cost and benefit standpoint and based on the breadth of its research, to propose a uniform stability regulation at this time, litigation may be better suited to the task of assessing individual types of vehicles and incidents. Contrary to the manufacturer's argument, it is not clear that this is not, in fact, what

> Congress had in mind when it included the "savings clause" in the Safety Act.

In Re Ford Motor Co. Bronco II, 1995 WL 683854, p. 6 (E.D. La. Nov. 13, 1995)

This astute declaration is directly on point with the case *sub judice*. The Coast Guard decided to adopt a recommendation to not even undertake formal regulatory rule-making procedures in regard to propeller guards at the time, in part, because it was uncertain whether uniform rules could be enacted at the time to apply to the myriad of boat engines on the market.[1]

Common law actions, as noted by the *Bronco* Court, "provide[ ] more individualized remedies" and "may be better suited to the task of assessing individual types of vehicles and incidents." This may be exactly what Congress had in mind when it included the Savings Clause in the Boat Safety Act. Indeed, the Coast Guard subcommittee recognized that litigation over propeller guards was ongoing, yet it did *not* mention that it intended to pre-empt these actions. There is no "clear and manifest" intent in the Boat Safety Act to differentiate between torts of omission and commission, and thus pre-emption should not be implied where it is expressly saved.

There is no textual support to conclude that a manufacturer's negligence through adding a propeller guard is

[1] The parties disagree as to whether Brunswick can produce a feasible propeller guard, and both have cited the record below to support their contentions. This is a factual dispute for trial which does not go to the pre-emption issue itself, and which has not yet been fully explored since this cause was submitted for summary judgment prior to discovery.

not pre-empted, while a manufacturer's negligence through failure to add a propeller guard is simultaneously pre-empted. Both the provision or non-provision of the guard "complies" with the Boat Safety Act, and by the express terms of the Savings Clause is subject to common law liability. There being no conflict between the expressly saved imposition of common law and the lack of any federal standard on propeller guards, it is error to impliedly pre-empt Plaintiffs' common law claims.

Thus, under this Court's prior holding in *Lohr* and *Freightliner*, it was error to impliedly pre-empt Appellants' claims.

CONCLUSION

The Eleventh Circuit has written an opinion that would give pre-emptive effect to the work of a study group, informal opinions or an agency decision to do nothing. This finding is not in accordance with recent Supreme Court authority cited herein, nor is it consistent with the express language used by Congress in enacting the Boat Safety Act. For all the foregoing reasons, Petitioners believe that the circuit decision is in conflict with United States Supreme Court precedent, and raises questions of fundamental, constitutional and exceptional

importance. Petitioners therefore respectfully request that their Petition For Writ of Certiorari be granted.

Respectfully submitted,

DAVID E. HUDSON
WILLIAM J. KEOGH, III
HULL, TOWILL, NORMAN & BARRETT
P.O. Box 1564
Augusta, Georgia 30903
(706) 722-4481

APPENDIX

TABLE OF CONTENTS

A. Opinions in the Case:

1. *Lewis v. Brunswick Corp.*, 107 F.3d 1494 (11th Cir. 1997). Appeal No. 96-8130. Jurisdiction: 28 U.S.C. § 1291 (review of final judgment of district courts). A1
2. *Lewis v. Brunswick Corp.*, 922 F.Supp. 613 (S.D. Ga. 1996). Civil Action No. CV 195-096. Jurisdiction: 28 U.S.C. § 1332 (diversity of citizenship and amount in controversy). A26
3. *Lewis v. Brunswick Corp.*, Order denying Petition for Rehearing and Suggestion of Rehearing En Banc. Appeal No. 96-8130. Entered May 15, 1997. . . . . A33

B. Statutory Provisions Involved:

1. 5 U.S.C. § 553. . . . . A37
2. 46 U.S.C. § 4302. . . . . A39
3. 46 U.S.C. § 4306. . . . . A41
4. 46 U.S.C. § 4311. . . . . A41

Vicky LEWIS, individually as parent, as next friend and as administrator of the estate of Kathryn C. Lewis, Gary Lewis, individually as parent, as next friend and as administrator of the estate of Kathryn C. Lewis, Plaintiffs-Appellants,

v.

BRUNSWICK CORPORATION, Defendant-Appellee.

No. 96-8130.

United States Court of Appeals, Eleventh Circuit.

March 21, 1997.

Parents of recreational boat passenger who died after she fell or was thrown from boat and was struck by the boat's propeller brought suit in state court against manufacturer of boat's outboard engine, asserting negligence and strict liability claims based on absence of propeller guard. Parents also asserted fraudulent misrepresentation claims, based on contention that manufacturer misrepresented performance differences between guarded engines and unguarded engines to discourage government agencies from adopting safety standard requiring propeller guards. After removal, the United States District Court for the Southern District of Georgia, No. CV 195-096, Dudley H. Bowen, Jr., J., 922 F.Supp. 613, granted summary judgment in favor of manufacturer on ground that claims were preempted by the Federal Boat Safety Act (FBSA), and plaintiffs appealed. The Court of Appeals, Carnes, Circuit Judge, held that: (1) text of the FBSA does not provide clear manifestation of intent to preempt claims, and thus they were not expressly preempted; (2)

position of Coast Guard rejecting propeller guard requirement is tantamount to a ruling that no such requirement may be imposed, and that position impliedly preempts state law requirements of propeller guards, even in the form of common-law state tort claims; and (3) Coast Guard position on propeller guards also preempted fraudulent misrepresentation claim.

Affirmed.

Appeal from the United States District Court for the Southern District of Georgia.

Before BIRCH, BLACK and CARNES, Circuit Judges.

CARNES, Circuit Judge:

Gary and Vicky Lewis appeal the district court's grant of summary judgment in favor of Brunswick Corporation ("Brunswick") on the Lewises' state common law negligence, product liability, and fraudulent misrepresentation claims. The Lewises sued Brunswick to recover damages for the death of their daughter, who died after she fell or was thrown from a boat and then struck by a Brunswick engine propeller. According to the Lewises, the Brunswick engine involved in their daughter's death was defective because it lacked a propeller guard. Upon Brunswick's motion for summary judgment, the district court held that the Lewises' claims were preempted by the Federal Boat Safety Act, 46 U.S.C. §§ 4301-4311 ("the FBSA" or "the Act"). We affirm.

In Part I of this opinion, we describe the facts and the procedural history of this case. We describe the standard of review in Part II, and we outline the Act and its regulatory scheme in Part III. In Part IV, we recount the

actions taken by the Coast Guard regarding propeller guards. We then summarize the positions of the parties in Part V of the opinion. In Part VI, we describe in general terms how state law may be preempted. We then proceed to consider, in Parts VII and VIII of the opinion, whether the Lewises' claims are preempted by the Act.

As we will explain in Part VII, the preemption clause and the savings clause in the Act provide contradictory indications of congressional intent relating to whether the Lewises' claims are expressly preempted. Because the text of the FBSA does not provide a clear manifestation of intent to preempt the claims, we cannot hold that they are expressly preempted. On the other hand, due to the conflict between the preemption clause and the savings clause, we cannot hold that those claims are expressly saved from preemption either. Consequently, our resolution of the question of preemption in this case turns on whether the Lewises' claims are impliedly preempted by the Act. We hold that they are, because those claims conflict with the Coast Guard's position that propeller guards should not be required.

I. FACTS AND PROCEDURAL HISTORY

On June 6, 1993, Kathryn Lewis was spending the day with her boyfriend's family in a boat on Strom Thurmond Lake in Georgia. While the boat was pulling Kathryn's boyfriend on an inner tube, the driver made a right-hand turn. Kathryn fell or was thrown from the left side of the boat. Once in the water, Kathryn was struck repeatedly in the head and body by the propeller of an engine designed and manufactured by Brunswick. The

engine did not have a propeller guard. Kathryn died instantly.

The Lewises filed suit against Brunswick in Georgia state court, alleging that the lack of a propeller guard made the Brunswick engine a defective product. They also claim that Brunswick committed negligence by failing to install a propeller guard on the engine. The Lewises' third claim avers that Brunswick attempted to suppress the production of propeller guards by third persons and exaggerated the performance differences between guarded engines and unguarded engines to discourage government agencies from adopting a safety standard requiring propeller guards.

Brunswick removed this case to federal district court on diversity grounds and moved for summary judgment. In its summary judgment motion, Brunswick contended that all of the Lewises' claims were preempted by the FBSA. The district court agreed and granted summary judgment in favor of Brunswick. The Lewises appeal.

II. STANDARD OF REVIEW

We apply the same legal standards in our preemption analysis that the district court was required to apply in its order granting summary judgment; therefore, we review the district court's decision *de novo*. *E.g., Southern Solvents, Inc. v. New Hampshire Ins. Co.*, 91 F.3d 102, 104 (11th Cir.1996).

III. THE FEDERAL BOAT SAFETY ACT

The FBSA was enacted in 1971 in part "to improve boating safety by requiring manufacturers to provide safer boats and boating equipment to the public through compliance with safety standards to be promulgated by the Secretary of the Department in which the Coast Guard is operating – presently the Secretary of Transportation." *P.L. 92-75, Federal Boat Safety Act of 1971*, S.Rep. No. 92-248, *reprinted in* 1971 U.S.C.C.A.N. 1333. To implement that goal, the Act grants authority to the Secretary of Transportation to prescribe regulations establishing minimum safety standards for recreational boats. *See* 46 U.S.C. § 4302 (West Supp.1995). The Secretary of Transportation has delegated rulemaking authority under the FBSA to the United States Coast Guard. *See* 49 C.F.R. § 1.46(n)(1) (1996).

The FBSA requires the Coast Guard to follow certain guidelines and procedures when promulgating a regulation under 46 U.S.C. § 4302. For instance, the Coast Guard must consider certain available data and "the extent to which the regulations will contribute to recreational vessel safety." 46 U.S.C.A. § 4302(c)(1)-(2) (West Supp.1995). The Coast Guard may not establish regulations compelling substantial alterations of existing boats and associated equipment unless compliance would "avoid a substantial risk of personal injury to the public." 46 U.S.C.A. § 4302(c)(3) (West Supp.1995). Before promulgating a regulation, the Coast Guard is required to consult with the National Boating Safety Advisory Council ("the Advisory Council") on the need for regulation. 46 U.S.C. § 4302(c)(4).

IV. COAST GUARD CONSIDERATION OF A PROPELLER GUARD REGULATION

In 1988, the Coast Guard directed the Advisory Council to examine the feasibility and potential safety advantages and safety disadvantages of propeller guards. In response, the Advisory Council appointed a Propeller Guard Subcommittee "to consider, review and assess available data concerning the nature and incidence of recreational boating accidents in which persons in the water are struck by propellers." National Boating Safety Advisory Council, Report of the Propeller Guard Subcommittee 1 (1989) ("Report"). The Advisory Council also asked the Subcommittee to consider whether "the Coast Guard [should] move towards a federal requirement for some form of propeller guard." *Id.* at Appendix A.

The Advisory Council Subcommittee held hearings on three occasions and received information from a variety of individuals and groups interested in the topic of propeller guards. *See id.* at 2-4. One of the matters on which the Subcommittee received information was propeller guard litigation, and the Subcommittee devoted a section of its report to the topic. *Id.* at 4. That section states that, at the time of the hearings, propeller guard advocates were petitioning federal and state legislators to mandate propeller guards. According to the Subcommittee Report, a legislative or administrative mandate "would necessarily be predicated on the feasibility of guards and establish prima facie manufacturer liability in having failed to provide them"; therefore, feasibility was an important question before the Subcommittee. *Id.* at 5. The report also discusses the theories of liability that

were being asserted by propeller guard victims and the defenses used by manufacturers. *Id.* at 4-5. Immediately following that discussion, the report notes that "[m]anufacturers are opposed to mandatory propeller guards." *Id.* at 5.

The Subcommittee also considered the technical issues posed by propeller guards. After reviewing the available scientific data and testimony, the Subcommittee found that propeller guards affect boat operation adversely at speeds greater than 10 miles per hour. *Id.* at 21. Further, the Subcommittee found that propeller guards would not increase overall safety, because they increase the chances of contact between a blunt object and a person in the water. *Id.* at 20-21. The Subcommittee Report states:

> Injuries/fatalities caused by underwater impacts result from a person coming into contact with the propeller or any part of the propulsion unit (i.e., lower unit, skeg, torpedo, anti-ventilation plate, etc.) and even the boat itself. Currently reported accidents make it obvious that all such components are involved in the total picture, and that the propeller itself is the sole factor in only a minority of impacts. The development and use of devices such as 'propeller guards' can, therefore, be counter-productive and can create new hazards of equal or greater consequence. . . . Although the controversy which currently surrounds the issue of propeller guarding is, by its very nature, highly emotional and has attracted a great deal of publicity, there are no indications that there is a generic or universal solution currently available or foreseeable in the future. The boating public

must not be misled into thinking there is a "safe" device which would eliminate or significantly reduce such injuries or fatalities.

Id. at 23-24. The report also states that:

> boats and motors should be designed to incorporate technologically feasible safety features to avoid or minimize the consequences of inexperienced or negligent operation, without at the same time (a) creating some other hazard, (b) materially interfering with normal operations, or (c) being at economic costs disproportionate to the particular risk.
>
> Proponents assert that propeller guard technology and/or availability meets the foregoing criteria and that guards should not be mandated. The Subcommittee does not agree. . . .

Id. at 20. In its conclusion, the Advisory Council Subcommittee Report recommends that "[t]he U.S. Coast Guard should take no regulatory action to require propeller guards." *Id.* at 24.

The Subcommittee presented its report to the entire Advisory Council, which accepted the report and adopted the recommendations of the Subcommittee. Minutes of the 44th Meeting of the National Boating Safety Advisory Council 19 (Nov. 6-7, 1989). The Advisory Council then forwarded the report and recommendations to the Coast Guard. The Coast Guard adopted each of the Advisory Council's recommendations, giving explanations of the Coast Guard's position on each matter. *See* Letter from Robert T. Nelson, Rear Admiral, U.S. Coast Guard, Chief, Office of Navigation, Safety and Waterway

Services to A. Newell Garden, Chairman, National Boating Safety Advisory Council (Feb. 1, 1990). The Coast Guard's position on propeller guards, which is set out in that letter, is as follows:

> The regulatory process is very structured and stringent regarding justification. Available propeller guard accident data do not support imposition of a regulation requiring propeller guards on motorboats. Regulatory action is also limited by the many questions about whether a universally acceptable propeller guard is available or technically feasible in all modes of boat operation. Additionally, the question of retrofitting millions of boats would certainly be a major economic consideration.
>
> The Coast Guard will continue to collect and analyze data for changes and trends; and will promote increased/improved accident reporting as addressed in recommendation 2. The Coast Guard will also review and retain any information made available regarding development and testing of new propeller guard devices or other information on the state of the art.

Id. at 1.

V. POSITIONS OF THE PARTIES

The Lewises contend that the FBSA does not expressly or impliedly preempt state law tort claims based on the absence of a propeller guard on a boat engine. According to the Lewises, common law claims are expressly saved from preemption by the Act's savings clause. Furthermore, the Lewises argue, the Act does not preempt any state law, regulation, or claims until the

Coast Guard issues a formal regulation on the matter. There being no regulation on propeller guards, the Lewises assert they may proceed with their case.

In response, Brunswick argues that the FBSA expressly preempts any state regulation, including regulation through common law claims, that conflicts with a Coast Guard regulation or regulatory position. Brunswick contends that the Coast Guard has made a regulatory decision that propeller guards cannot be required. For that reason, Brunswick says, the Lewises' claims are expressly preempted by the Act. Furthermore, even if the Lewises' claims are not expressly preempted, Brunswick argues that the claims conflict with the Coast Guard's position that propeller guards should not be required. For that reason, Brunswick contends, the claims are preempted by implication.

VI. AN OVERVIEW OF PREEMPTION DOCTRINE

Any state law that conflicts with federal law is preempted by the federal law and is without effect under the Supremacy Clause of the Constitution. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516, 112 S.Ct. 2608, 2617, 120 L.Ed.2d 407 (1992). State regulation established under the historic police powers of the states is not superseded by federal law unless preemption is the clear and manifest purpose of Congress. *Id.* Accordingly, the intent of Congress is the touchstone of preemption analysis. *See id.*

Congressional intent to preempt state law may be revealed in several ways: (1) "express preemption," in which Congress defines explicitly the extent to which its

enactments preempt state law; (2) "field preemption," in which state law is preempted because Congress has regulated a field so pervasively, or federal law touches on a field implicating such a dominant federal interest, that an intent for federal law to occupy the field exclusively may be inferred; and (3) "conflict preemption," in which state law is preempted by implication because state and federal law actually conflict, so that it is impossible to comply with both, or state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Teper v. Miller*, 82 F.3d 989, 993 (11th Cir.1996) (citations omitted).

By including an express preemption clause in the FBSA, Congress has demonstrated its intent that the Act preempt at least some state law. *See* 46 U.S.C. § 4306. Therefore, the issue in this case is not whether Congress intended for the FBSA to have any preemptive effect, but the intended scope of preemption – the extent to which the FBSA preempts state law. *See Medtronic, Inc. v. Lohr*, ___ U.S. ___, ___, 116 S.Ct. 2240, 2250, 135 L.Ed.2d 700 (1996). In areas traditionally regulated by the states through their police powers, we apply a presumption in favor of a narrow interpretation of an express preemption clause. *Id.* at ___, 116 S.Ct. at 2250.

VII. EXPRESS PREEMPTION

Brunswick contends that the Lewises' claims fall within the scope of the FBSA's express preemption clause, which provides:

> Unless permitted by the Secretary under section 4305 of this title, a State or a political subdivision of a State may not establish, continue in effect, or enforce a law or regulation establishing a recreational vessel or associated equipment performance or other safety standard or imposing a requirement for associated equipment (except insofar as the State or political subdivision may, in the absence of the Secretary's disapproval, regulate the carrying or use of marine safety articles to meet uniquely hazardous conditions or circumstances within the State) that is not identical to a regulation prescribed under section 4302 of this title.

46 U.S.C.A. § 4306 (West Supp.1995). According to Brunswick, the Lewises' claims, if successful, would result in a regulation imposing a propeller guard requirement. That regulation would not be identical to – in fact, it would be in conflict with – the Coast Guard's position that propeller guards should not be required. In Brunswick's view, the Coast Guard's position is equivalent to a "regulation prescribed under section 4302," which preempts state law. Following this reasoning, Brunswick argues that the Lewises' claims are preempted by the express terms of the FBSA preemption clause.

In response, the Lewises contend that the phrase "law or regulation" does not reach common law claims, because Congress did not mention "common law" specifically in the preemption clause. According to the Lewises, Congress' decision not to specify "common law" in the preemption clause demonstrates congressional intent to save common law claims. As Brunswick points out, however, the omission of the phrase "common law"

in the preemption clause is not determinative, because "law" and "regulation" may be read to include state tort actions. *See Cipollone*, 505 U.S. at 520-30, 112 S.Ct. at 2619-25 (1992) (plurality opinion) (holding that the phrase "State law" in the Federal Cigarette Labeling and Advertising Act was intended to include common law claims); *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664, 113 S.Ct. 1732, 1737, 123 L.Ed.2d 387 (1993) (common law claims fall within the scope of the phrases "law, rule, regulation, order, or standard"). In fact, the overwhelming majority of courts have held that common law claims fall within the scope of "law[s]" and "regulation[s]" expressly preempted by the FBSA. *See Moss v. Outboard Marine Corp.*, 915 F.Supp. 183, 186 (E.D.Cal.1996); *Davis v. Brunswick Corp.*, 854 F.Supp. 1574, 1580 (N.D.Ga.1993); *Shield v. Bayliner Marine Corp.*, 822 F.Supp. 81, 84 (D.Conn.1993); *Shields v. Outboard Marine Corp.*, 776 F.Supp. 1579, 1581 (M.D.Ga.1991); *Mowery v. Mercury Marine*, 773 F.Supp. 1012, 1017 (N.D.Ohio1991); *Farner v. Brunswick Corp.*, 239 Ill.App.3d 885, 180 Ill.Dec. 493, 497-98, 607 N.E.2d 562, 566-67 (1992); *Ryan v. Brunswick Corp.*, 454 Mich. 20, 557 N.W.2d 541, 548-49 (1997). *Contra Moore v. Brunswick Bowling & Billiards Corp.*, 889 S.W.2d 246, 250 (Tex.), *cert. denied*, ___ U.S. ___, 115 S.Ct. 664, 130 L.Ed.2d 599 (1994).

We agree that the terms "law" and "regulation" evidence an intent to include common law claims. However, we stop short of concluding that common law claims are expressly preempted by the FBSA, because another provision in the Act pulls us away from that conclusion. As the Lewises point out, Congress included a savings clause in the Act, which seems to save common law claims from

preemption. That clause, which is found within the section of the Act entitled "Penalties and Injunctions," provides:

> Compliance with this chapter or standards, regulations, or orders prescribed under this chapter does not relieve a person from liability at common law or under State law.

46 U.S.C.A. § 4311(g) (West Supp.1995).

Because the FBSA preempts an area (safety) that historically has been regulated by the states through their police powers, we must construe the Act's preemption clause narrowly. *See Medtronic*, ___ U.S. at ___, 116 S.Ct. at 2250. The preemption clause easily could be read to cover common law claims, but because the savings clause indicates that at least some common law claims survive express preemption, we cannot give the preemption clause that broad reading. Instead, we must resolve doubts in favor of the narrower interpretation of the preemption clause and conclude that the express preemption clause does not cover common law claims. We hold that those claims are not expressly preempted.

The Lewises urge us to go further and hold that the savings clause demonstrates clear congressional intent to save common law claims from preemption. We find congressional intent to be less than clear, given the conflicting language in the preemption and savings clauses. Just as the conflict between those provisions prevents us from concluding that the Lewises' claims are expressly preempted, so also does that conflict prevent us from concluding that those claims are expressly saved. *See Taylor v. General Motors Corp.*, 875 F.2d 816, 825 (11th Cir.1989)

(interpreting the National Traffic and Motor Vehicle Safety Act). The express terms of the FBSA simply fail to answer the question of whether Congress intended to preempt common law claims. As a result, our decision about preemption depends on whether the Lewises' claims are impliedly preempted by federal law. *See id.* at 827-28.

VIII. IMPLIED CONFLICT PREEMPTION

The Lewises' claims are preempted impliedly by the FBSA to the extent that those claims conflict with the "accomplishment and execution of the full purposes and objectives of Congress." *See Freightliner Corp. v. Myrick*, 514 U.S. 280, ___, 115 S.Ct. 1483, 1487, 131 L.Ed.2d 385 (1995). In other words, the Lewises' claims are preempted if they prevent or hinder the FBSA from operating the way Congress intended it to operate. In deciding whether the Lewises' claims conflict with the purposes of the FBSA, we do not apply a presumption against preemption, even though common law tort claims are a mechanism of the police powers of the state. *Taylor*, 875 F.2d at 826. "Under the Supremacy Clause of the Federal Constitution, '[t]he relative importance to the State of its own law is not material when there is a conflict with a valid federal law,' for 'any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield.' " *Felder v. Casey*, 487 U.S. 131, 138, 108 S.Ct. 2302, 2307, 101 L.Ed.2d 123 (1988) (citations omitted).

According to Brunswick, the Lewises' claims are preempted by implication because those claims would interfere with the regulatory scheme enacted by Congress in the FBSA. Brunswick argues that the Coast Guard has the last say on whether a safety feature on boats or associated equipment should be required. Where the Coast Guard believes that a safety feature should not be required, Brunswick argues that states may not require the feature, even through common law claims.

"[A] federal decision to forgo regulation in a given area may imply an authoritative federal determination that the area is best left *un*regulated, and in that event would have as much preemptive force as a decision *to* regulate." *Arkansas Elec. Cooperative Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 384, 103 S.Ct. 1905, 1912, 76 L.Ed.2d 1 (1983) (emphasis in original). Though a decision not to regulate does not always have preemptive effect, *see Puerto Rico Dept. of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495, 503, 108 S.Ct. 1350, 1355, 99 L.Ed.2d 582 (1988), it does "where [the] failure of . . . federal officials affirmatively to exercise their full authority takes on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute." *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 178, 98 S.Ct. 988, 1004, 55 L.Ed.2d 179 (1978) (citations omitted).

The Lewises argue that the rule of *Atlantic Richfield* does not apply here, because Congress did not intend for a mere decision not to regulate to have preemptive effect under the FBSA. In the Lewises' view, any state regulation on boat and equipment safety standards is permissible, unless the Coast Guard promulgates a regulation

that conflicts with the state regulation. As the Lewises understand the FBSA regulatory scheme, a Coast Guard position not to impose a safety standard on a matter leaves room for states to impose safety standards on that matter. There being no regulation on propeller guards, the Lewises argue that their claims are not affected by the Coast Guard's position. For support, they point to *Freightliner Corp. v. Myrick*, 514 U.S. 280, 115 S.Ct. 1483, 131 L.Ed.2d 385 (1995), a case in which the Supreme Court concluded that an absence of regulation on a safety matter did not preempt state common law claims imposing such standards.

In *Freightliner*, the Supreme Court considered whether common law claims based on the failure to install antilock brakes were expressly or impliedly preempted by the Vehicle Safety Act. *See id.* at ___, 115 S.Ct. at 1485. The preemption clause in the Vehicle Safety Act provided:

> Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard.

15 U.S.C.A. § 1392(d) (West 1982) (repealed 1994). The defendants in *Freightliner* argued that the failure-to-install claims were preempted, because the relevant agency had

indicated its intent to regulate braking systems by promulgating a regulation on that matter. That regulation was struck down by an appellate court, but the defendants in *Freightliner* believed it still had preemptive effect, because it demonstrated the agency's intent to forbid state regulation on braking systems. *Id.* at ___, 115 S.Ct. at 1487.

The Supreme Court rejected that argument. First, the Court explained, there was no evidence that the Vehicle Safety Act gave the relevant federal agency exclusive authority to issue safety standards. *Id.* In fact, the preemption clause in that act clearly implied that states could impose safety standards on auto manufacturers, until the federal government came forward with a different standard. Therefore, under the Vehicle Safety Act regulatory scheme, the absence of regulation failed to have preemptive effect under the *Atlantic Richfield* doctrine; instead, the agency's failure to put into effect a valid regulation left the state common law intact. *Id.* Furthermore, the Court reasoned, *Atlantic Richfield* was inapposite because:

> the lack of federal regulation [on antilock brakes] did not result from an affirmative decision of agency officials to refrain from regulating air brakes. [The agency] did not decide that the minimum, objective safety standard required by 15 U.S.C. § 1392(a) should be the absence of all standards, both federal and state.

Id. (footnote omitted).

In contrast to the Vehicle Safety Act, the FBSA was intended to give its regulatory agency – the Coast Guard – exclusive authority to issue safety standards:

> This section [containing the preemption clause] provides for federal preemption in the issuance of boat and equipment safety standards. This conforms to the long history of preemption in maritime safety matters and is founded on the need for uniformity applicable to vessels moving in interstate commerce. In this case it also assures that manufacture for the domestic trade will not involve compliance with widely varying local requirements. At the same time, it was recognized that there may be serious hazards which are unique to a particular locale and which would justify variances at least with regard to the carriage or use of marine safety articles on boats. Therefore, the section does permit individual States to impose requirements with respect to carrying or using marine safety articles which go beyond the federal requirements when necessary to meet uniquely hazardous local conditions or circumstances. A right of disapproval, however, is reserved to the Secretary to insure that indiscriminate use of state authority does not seriously impinge on the basic need for uniformity.
>
> The section does not preempt state law or regulation directed at safe boat operation and use, which was felt to be appropriately within the purview of state or local concern.

S.Rep. No. 92-248, *reprinted in* 1971 U.S.C.C.A.N. at 1341. *See Elliott v. Brunswick Corp.*, 903 F.2d 1505, 1508 (11th Cir.1990) ("[T]he [FBSA] gives the Coast Guard the exclusive responsibility for establishing safety regulations.") (dicta); *Williams v. U.S. Dept. of Transportation*, 781 F.2d 1573, 1577 & n. 4 (11th Cir.1986) (with the FBSA Congress

expressly preempted state regulation regarding performance and safety standards for boats and associated equipment) (dicta). While an absence of regulation under the Vehicle Safety Act does not prevent states from regulating motor vehicle safety standards, an absence of federal regulation under the FBSA means that no regulation, state or federal, is appropriate. *Freightliner* is distinguishable for that reason.

Also in contrast to *Freightliner*, the relevant agency here, the Coast Guard, *did* make an affirmative decision to refrain from regulating propeller guards. Unlike the agency in *Freightliner*, the Coast Guard did not try to promulgate a regulation, and then fail, under a statutory scheme that would leave state law intact in the absence of federal regulatory action. Instead, under a statutory scheme that forbids any state standard or regulation "not identical to" a federal regulation, the Coast Guard decided not to issue a regulation. After consulting with the Advisory Council and reviewing the available data, the Coast Guard reached a carefully considered decision that "[a]vailable propeller guard accident data do not support imposition of a regulation requiring propeller guards on motorboats."

The Coast Guard did not decide that only a federal regulation would be inappropriate, but that the scientific data counseled against any regulation requiring propeller guards. Given that Congress intended for the FBSA to create a uniform system of regulation, and that the Coast Guard has determined that propeller guards should not be required, the Coast Guard's position mandates an absence of both federal and state propeller guard requirements. *See Ryan v. Brunswick Corp.*, 454 Mich. 20, 557

N.W.2d 541, 549-50 (1997). *See also Puerto Rico*, 485 U.S. at 503, 108 S.Ct. at 1355 ("Where a comprehensive federal scheme intentionally leaves a portion of the regulated field without controls, *then* the preemptive inference can be drawn – not from federal inaction alone, but from inaction joined with action.") (emphasis in original). *Freightliner* does not require that we hold otherwise.

But the Lewises contend that even if *Freightliner* is not controlling here, we cannot find an implied conflict between their claims and the Act, because we know from the savings clause that Congress expected some common law claims to be brought in this area. About the savings clause, the Senate report says:

> This section is a Committee amendment and is intended to clarify that compliance with the Act or standards, regulations, or orders promulgated thereunder, does not relieve any person from liability at common law or under State law. The purpose of the section is to assure that in a product liability suit mere compliance by a manufacturer with the minimum standards promulgated under the Act will not be a complete defense to liability. Of course, depending on the rules of evidence of the particular judicial forum, such compliance may or may not be admissible for its evidentiary value.

S.Rep. No. 92-248, *reprinted in* 1971 U.S.C.C.A.N. at 1352.

From the savings clause, we know that Congress understood at least some product liability claims to be consistent with the FBSA regulatory scheme. In order to decide which claims, we must determine when product liability claims can be brought without upsetting the

overall scheme Congress intended. Addressing that question, several courts have held that the only claims which do not present a conflict with the FBSA regulatory scheme are product liability claims based on the defective design or installation of products that are already installed, as opposed to claims based on the failure to install a certain safety device. *See Carstensen v. Brunswick Corp.*, 49 F.3d 430, 432 (8th Cir.), *cert. denied*, ___ U.S. ___, 116 S.Ct. 182, 133 L.Ed.2d 120 (1995); *Moss v. Outboard Marine Corp.*, 915 F.Supp. 183, 187 (E.D.Cal.1996); *Mowery v. Mercury Marine*, 773 F.Supp. 1012, 1017 (N.D.Ohio 1991); *Rubin v. Brutus Corp.*, 487 So.2d 360, 363 (Fla.Dist.Ct.App.1986); *Farner v. Brunswick Corp.*, 239 Ill.App.3d 885, 180 Ill.Dec. 493, 498, 607 N.E.2d 562, 567 (1992); *Ryan v. Brunswick Corp.*, 209 Mich.App. 519, 531 N.W.2d 793, 796 n. 1 (1995), *aff'd*, 454 Mich. 20, 557 N.W.2d 541 (1997); *Mulhern v. Outboard Marine Corp.*, 146 Wis.2d 604, 432 N.W.2d 130, 134-35 (1988). Permitting product liability claims against manufacturers for negligent or defective design of products required by the Coast Guard, or for products provided voluntarily by manufacturers, simply requires manufacturers to comply with FBSA regulations, and to do any additional manufacturing, in a non-negligent and non-defective manner. Permitting such claims is consistent with the FBSA scheme, which is designed to ensure that boats and associated equipment are safe.

By contrast, claims based on the failure to install a product that the Coast Guard has decided should not be required would conflict with the regulatory uniformity purpose of the FBSA. Without doubt, the Lewises' product liability claims seek to impose a propeller guard

requirement. *See Carstensen*, 49 F.3d at 432. That requirement conflicts with the FBSA's grant of exclusive regulatory authority to the Coast Guard, and for that reason those claims are in conflict with and are therefore preempted by the Act.

The Lewises argue that their fraud claim should be treated differently from their other claims, because it would not create a propeller guard requirement beyond FBSA requirements. We disagree. If the Lewises succeeded with their fraud claim, a jury could impose liability upon Brunswick for attempting to persuade the Coast Guard and others that propeller guards are unsafe. The necessary element of causation in any such claim would be that but for the wrongful conduct of Brunswick, propeller guards would have been required by the Coast Guard. Such a judgment would conflict with the Coast Guard's position that propeller guards should not be required. Thus, the fraud claim is impliedly preempted by the Coast Guard's position and the preemptive effect given that position by the FBSA.

Regulatory fraud claims of this nature are impliedly preempted for fundamental, systemic reasons. Permitting such claims would allow juries to second-guess federal agency regulators through the guise of punishing those whose actions are deemed to have interfered with the proper functioning of the regulatory process. If that were permitted, federal regulatory decisions that Congress intended to be dispositive would merely be the first round of decision making, with later more important rounds to be played out in the various state courts. Virtually any federal agency decision that stood in the way of a lawsuit could be challenged indirectly by a claim that

the industry involved had misrepresented the relevant data or had otherwise managed to skew the regulatory result. Ironically, such circumvention of the regulatory scheme likely would be more pronounced where, as here, Congress mandated more extensive industry input into the regulatory process. *See* 46 U.S.C. § 4302(c). Congress could not have intended for the process it so carefully put in place to be so easily and thoroughly undermined.[1]

In sum, we conclude that because Congress has made the Coast Guard the exclusive authority in the area of boat and equipment safety standards, its position rejecting a propeller guard requirement takes on the character of a ruling that no such requirement may be imposed. That position impliedly preempts state law requirements of propeller guards, even in the form of common law claims. It also prevents plaintiffs from bringing fraud claims intended to demonstrate that the Coast Guard would have reached a different conclusion on the matter of propeller guards but for alleged industry manipulation or subversion of the federal regulatory process. We hold that each of the Lewises' claims is preempted by implication because it conflicts with the Coast Guard's position

---

[1] The Lewises' claim may be read to address alleged fraudulent misrepresentations by Brunswick to individuals and groups outside the federal government. To the extent that the Lewises intended to hold Brunswick liable for allegedly dissuading other manufacturers from installing propeller guards, their claim fails on causation grounds, because their daughter was struck by a propeller on a Brunswick motor. To the extent that the Lewises seek to hold Brunswick liable for alleged fraud upon state regulators, their fraud claim is preempted because state regulatory decisions of the propeller guard issue are themselves preempted.

on propeller guards and would interfere with the FBSA regulatory process designed by Congress.

IX. CONCLUSION

The district court's grant of summary judgment to Brunswick is AFFIRMED.

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA AUGUSTA DIVISION

VICKY LEWIS and GARY LEWIS, individually as parents, as next friends and as administrator of the estate of KATHRYN C. LEWIS,	*	CIVIL ACTION NO. CV 195-96
Plaintiffs,	*	(Filed Jan. 22, 1996)
vs.	*	
BRUNSWICK CORP.,	*	
Defendant.	*	

ORDER

Before the Court is Defendant's Motion for Summary Judgment in the above-captioned case. Upon consideration of the parties' briefs and oral arguments before this Court on December 14, 1995, the Motion for Summary Judgment is **GRANTED** for the reasons stated below.

For purposes of this motion, the parties stipulate the following facts. On June 6, 1993, Plaintiffs' decedent fell or was thrown from a recreational boat. She died from injuries she sustained immediately after her fall when she was struck by the boat's propeller. The boat involved in the accident was equipped with an outboard motor and propeller manufactured or marketed by Defendant Brunswick Corp. ("Brunswick").

The decedent's parents filed this action against Brunswick, asserting common law claims premised on Brunswick's failure to equip the outboard motor with some form of propeller guard. Brunswick contends that these claims are preempted by the Federal Boat Safety Act of 1971 ("FBSA"), 46 U.S.C. § 4301 *et seq.*

Under the FBSA, the Secretary of Transportation may prescribe regulations which establish "minimum safety standards for recreational vessels and associated equipment . . . " 46 U.S.C. § 4302. Rule-making authority under the FBSA has been delegated to the Commandant of the United States Coast Guard, acting through the Secretary of Transportation. The enabling legislation requires the Coast Guard to consult on such matters with the National Boating Safety Advisory Council. *Id.* § 4302(c)(4).

On May 11, 1988, the Coast Guard appointed a subcommittee of the Advisory Counsel "to consider, review and assess available data concerning the nature and incidence of recreational boating accidents in which persons in the water are struck by propellers. Feasibility of some form of mechanical guard or other action to prevent such contact was to be examined." After extensive research and analysis, the subcommittee determined propeller guards would have only a negligible impact on boating safety, the guards could create new hazards of equal or greater consequence, and the guards were technologically infeasible. Its final suggestion was that the Coast Guard "should take no regulatory action to require propeller guards." These findings and conclusions were adopted unanimously by the Advisory Council.

In a letter of February 1990, Rear Admiral Robert T. Nelson adopted the Advisory Council's recommendation as the position of the Coast Guard, stating, "Available propeller guard accident data do not support imposition of a regulation requiring propeller guards on motorboats." Brunswick argues this decision not to require propeller guards preempts any state attempt to require the installation of propeller guards, including common law tort claims.

Generally, any state law that conflicts with federal law is preempted and without effect under the Supremacy Clause of the Constitution. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992). Federal preemption analysis "start[s] with the assumption that the historic police powers of the States [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress." *Id.* at 516 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). Thus, the critical question in testing preemption is whether Congress intended that the relevant federal regulation or law supersede state law.

Section 4306 of the FBSA, which is relevant to identifying the FBSA's preemptive reach, provides the following:

> [A] State or political subdivision of a State may not establish, continue in effect, or enforce a law or regulation establishing a recreational vessel or associated equipment performance or other safety standard or imposing a requirement for associated equipment . . . that is not identical to a regulation prescribed under section 4302 of this title.

This section prohibits states from establishing or enforcing safety standards that are not identical to regulations prescribed under Section 4302 of the FBSA. Common law causes of action may constitute state regulation and "impose a requirement" on manufacturers to have propeller guards through an award of damages. *Cipollone*, 505 U.S. at 521 (citing *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 247 (1959)). Common law damages actions are premised on the existence of a legal duty. *Id.* Thus, such actions necessarily impose "requirements" or "standards" subject to federal preemption. *Id.* at 521-22, *cited in CSX Transp., Inc. v. Easterwood*, 507 U.S. 658 (1993) (summarizing *Cipollone* as stating that when a federal statute bars additional requirements imposed under state law, the federal statute preempts common law claims); *Papas v. Upjohn Co.*, 985 F.2d 516 (11th Cir.), *cert. denied*, 114 S. Ct. 300 (1993). Also, the words "law" and "regulation" include common law tort claims. Accordingly, because the Coast Guard has expressly chosen not to require propeller guards as a minimum safety requirement, a damage award against Brunswick based on a common law tort claim would impose a regulation on it "not identical" to federal law.

Plaintiffs argue that there has been no clear "regulation" of propeller guards. However, the Coast Guard's position on the use of propeller guards is that there should be no regulation requiring propeller guards. The Coast Guard reached this decision only after extensive research, testing, and testimony. The final report of the Advisory Council indicates that the use of propeller guards is infeasible, ineffective as a safety measure, and

indeed, imposes unique safety hazards. Thus, the decision that the area is best left unregulated has as much preemptive effect as a determination to regulate. *Arkansas Elec. Co-op. Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375 (1983).

I find that the Coast Guard's action in this matter is tantamount to a prohibition against states from adopting a regulation requiring propeller guards on recreational boats. Thus, a common law action premised on the failure to provide a propeller guard is a preempted state requirement under Section 4306 of the FBSA. This finding is supported in the following published cases: *Carstensen v. Brunswick Corp.*, 49 F.3d 430 (8th Cir.), *cert. denied*, 116 S. Ct. 182 (1995); *Davis v. Brunswick Corp.*, 854 F. Supp. 1574 (N.D. Ga. 1993); *Shield v. Bayliner Marine Corp.*, 822 F. Supp. 81 (D. Conn. 1993); *Shields v. Outboard Marine Corp.*, 776 F. Supp. 1579 (M.D. Ga. 1991); *Mowery v. Mercury Marine, Div. of Brunswick Corp.*, 773 F. Supp. 1012 (N.D. Ohio 1991); *Ryan v. Brunswick Corp.*, 531 N.W.2d 793 (Mich. Ct. App. 1995); *Farner v. Brunswick Corp.*, 607 N.E.2d 562 (Ill. Ct. App. 1992), *appeal denied*, 616 N.E.2d 333 (Ill. 1993).

Even if the Coast Guard sufficiently demonstrated an intent to allow manufacturers to build boat motors without propeller guards, Plaintiffs contend that the FBSA's savings clause preserves common law tort actions regardless of the action taken by the Coast Guard. Section 4311(g) provides: "Compliance with this chapter or standards, regulations, or orders prescribed under this chapter does not relieve a person from liability at common law or under State law."

Plaintiffs argue this savings clause expresses Congress' clear intention to preserve common law tort claims under the Act, especially because Section 4306 does not expressly provide for the preemption of common law claims. Plaintiffs concede that had the savings clause not been in the FBSA, the Court would be free to include common law claims in the terms "law" and "regulation" in the preemption clause. However, because the savings clause was included, they argue those terms are stripped of the inclusion of common law claims. Plaintiffs cite the Eleventh Circuit decision in *Myrick v. Freuhauf Corp.* in support of this position. 13 F.3d 1516 (11th Cir. 1994), *aff'd sub. nom., Freightliner Corp. v. Myrick*, 115 S. Ct. 1483 (1995). However, the preemptive clause in the Motor Vehicle Safety Act at issue in *Myrick* was much narrower. It only preempted state safety "standards," not "laws, regulations, and requirements." Thus, *Myrick* is distinguishable.

Other courts have reconciled the savings clause with the preemption clause, finding that the savings clause preserved claims of liability for defectively designed products that are *actually installed*. *Shield*, 822 F. Supp. 81; *Mowery*, 773 F. Supp. 1012. Thus, if Brunswick chose to surpass the minimum requirements of the Coast Guard and install propeller guards, the savings clause would preserve common law tort claims based upon any defective design thereof.

For the reasons stated above, I find Plaintiffs' claims in this action are preempted under Section 4306 of the FBSA. Accordingly, Defendant's Motion for Summary Judgment is **GRANTED**. The clerk is instructed to

CLOSE this case and **ENTER FINAL JUDGMENT** in favor of Defendant, taxing costs against Plaintiffs.

ORDER ENTERED at Augusta, Georgia, this 22nd day of January, 1996.

/s/ Dudley H. Bowen Jr.
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 96-8130

VICKY LEWIS, individually as parent, as next friend and as administrator of the estate of Kathryn C. Lewis, GARY LEWIS, individually as parent, as next friend and as administrator of the estate of Kathryn C. Lewis, Plaintiffs-Appellants,

versus

BRUNSWICK CORPORATION, Defendant-Appellee.

On Appeal from the United States District Court for the Southern District of Georgia

---

(Filed May 15, 1997)

BEFORE: BIRCH, BLACK and CARNES, Circuit Judges.

PER CURIAM:

The petition(s) for rehearing filed by Appellants, VICKY LEWIS AND GARY LEWIS, individually as parent, as next friend, and as administrator of the estate of Kathryn C. Lewis is DENIED.

ENTERED FOR THE COURT:

/s/ Ed Carnes
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 96-8130

VICKY LEWIS, individually as parent, as next friend and as administrator of the estate of Kathryn C. Lewis, GARY LEWIS, individually as parent, as next friend and as administrator of the estate of Kathryn C. Lewis, Plaintiffs-Appellants,

versus

BRUNSWICK CORPORATION, Defendant-Appellee.

On Appeal from the United States District Court for the Southern District of Georgia

---

(Filed May 15, 1997)

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

(Opinion _____, 11th Cir., 19__, ___ F.2d ___).

BEFORE: BIRCH, BLACK and CARNES, Circuit Judges.

PER CURIAM:

The petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be

polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE CIRCUIT COURT:

/s/ Ed Carnes
UNITED STATES CIRCUIT JUDGE

---

5 U.S.C. § 553

§ 553. Rule making

(a) This section applies, according to the provisions thereof, except to the extent that there is involved –

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include –

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply –

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and

public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except –

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

* * *

46 U.S.C. § 4302

§ 4302. Regulations

(a) The Secretary may prescribe regulations –

(1) establishing minimum safety standards for recreational vessels and associated equipment, and establishing procedures and tests required to measure conformance with those standards, with each standard –

(A) meeting the need for recreational vessel safety; and

(B) being stated, insofar as practicable, in terms of performance;

(2) requiring the installation, carrying, or use of associated equipment (including fuel systems, ventilation systems, electrical systems, sound-producing devices, firefighting equipment, life-saving devices, signaling devices, ground tackle, life- and grab-rails, and navigational equipment) on recreational vessels and classes of recreational vessels subject to this chapter, and prohibiting the installation, carrying, or use of associated equipment that does not conform with safety standards established under this section; and

(3) requiring or permitting the display of seals, labels, plates, insignia, or other devices for certifying or evidencing compliance with safety regulations and standards of the United States Government for recreational vessels and associated equipment.

(b) Each regulation prescribed under this section shall specify an effective date that is not earlier than 180 days from the date the regulation was published, unless

the Secretary finds that there exists a recreational vessel safety hazard so critical as to require an earlier effective date. However, this period may not be more than 24 months for cases involving, in the discretion of the Secretary, major product design, retooling, or major changes in the manufacturing process.

(c) In prescribing regulations under this section, the Secretary shall, among other things –

(1) consider the need for and the extent to which the regulations will contribute to recreational vessel safety;

(2) consider relevant available recreational vessel safety standards, statistics, and data, including public and private research, development, testing, and evaluation;

(3) not compel substantial alteration of a recreational vessel or item of associated equipment that is in existence, or the construction or manufacture of which is begun before the effective date of the regulation, but subject to that limitation may require compliance or performance, to avoid a substantial risk of personal injury to the public, that the Secretary considers appropriate in relation to the degree of hazard that the compliance will correct; and

(4) consult with the National Boating Safety Advisory Council established under section 13110 of this title about the considerations referred to in clauses (1)-(3) of this subsection.

(d) Section 8903 of this title does not apply to a vessel being operated for bona fide dealer demonstrations provided without fee to business invitees. However, if on the basis of substantial evidence, the Secretary

decides under this section that requiring vessels so operated to be under the control of licensed individuals is necessary for boating safety, then the Secretary may prescribe regulations requiring the licensing of individuals controlling these vessels in the same manner as provided in chapter 89 of this title for individuals in control of vessels carrying passengers for hire.

* * *

46 U.S.C. § 4306

§ 4306. Federal preemption

Unless permitted by the Secretary under section 4305 of this title, a State or political subdivision of a State may not establish, continue in effect, or enforce a law or regulation establishing a recreational vessel or associated equipment performance or other safety standard or imposing a requirement for associated equipment (except insofar as the State or political subdivision may, in the absence of the Secretary's disapproval, regulate the carrying or use of marine safety articles to meet uniquely hazardous conditions or circumstances within the State) that is not identical to a regulation prescribed under section 4302 of this title.

* * *

46 U.S.C. § 4311

§ 4311. Penalties and injunctions

(a) A person willfully operating a recreational vessel in violation of this chapter or a regulation prescribed

under this chapter shall be fined not more than $5,000, imprisoned for not more than one year, or both.

(b) A person violating section 4307(a)(1) of this title is liable to the United States Government for a civil penalty of not more than $2,000, except that the maximum civil penalty may be not more than $100,000 for a related series of violations. When a corporation violates section 4307(a)(1), any director, officer, or executive employee of the corporation who knowingly and willfully ordered, or knowingly and willfully authorized, a violation is individually liable to the Government for the penalty, in addition to the corporation. However, the director, officer, or executive employee is not liable individually under this subsection if the director, officer, or executive employee can demonstrate by a preponderance of the evidence that –

(1) the order or authorization was issued on the basis of a decision, in exercising reasonable and prudent judgment, that the defect or the nonconformity with standards and regulations constituting the violation would not cause or constitute a substantial risk of personal injury to the public; and

(2) at the time of the order or authorization, the director, officer, or executive employee advised the Secretary in writing of acting under this clause and clause (1) of this subsection.

(c) A person violating any other provision of this chapter or other regulation prescribed under this chapter is liable to the Government for a civil penalty of not more than $1,000. If the violation involves the operation of a vessel, the vessel also is liable in rem for the penalty.

(d) When a civil penalty of not more than $200 has been assessed under this chapter, the Secretary may refer the matter of collection of the penalty directly to the United States magistrate of the jurisdiction in which the person liable may be found for collection procedures under supervision of the district court and under an order issued by the court delegating this authority under section 636(b) of title 28.

(e) The district courts of the United States have jurisdiction to restrain a violation of this chapter, or to restrain the sale, offer for sale, introduction or delivery for introduction into interstate commerce, or importation into the United States, of a recreational vessel or associated equipment that the court decides does not conform to safety standards of the Government. A civil action under this subsection shall be brought by filing a petition by the Attorney General for the Government. When practicable, the Secretary shall give notice to a person against whom an action for injunctive relief is contemplated and provide the person with an opportunity to present views and, except for a knowing and willful violation, shall provide the person with a reasonable opportunity to achieve compliance. The failure to give notice and provide the opportunity does not preclude the granting of appropriate relief by the district court.

(f) A person is not subject to a penalty under this chapter if the person –

(1) establishes that the person did not have reason to know, in exercising reasonable care, that a recreational vessel or associated equipment does not conform with the applicable safety standards of the Government or that the person was not advised by

the Secretary or the manufacturer of that vessel, equipment or component that the vessel, equipment or component contains a defect which creates a substantial risk of personal injury to the public; or

(2) holds a certificate issued by the manufacturer of that recreational vessel or associated equipment to the effect that the recreational vessel or associated equipment conforms to all applicable recreational vessel safety standards of the Government, unless the person knows or reasonably should have known that the recreational vessel or associated equipment does not so conform.

(g) Compliance with this chapter or standards, regulations, or orders prescribed under this chapter does not relieve a person from liability at common law or under State law.